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Office of Administrative Law Judges
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Issue Date: 29 September 2003

Case No. 2002-BLA-05202

In the Matter of:
GARRETT TAYLOR,
Claimant,

v.

RB COAL COMPANY,
Employer,
and
AMERICAN MINING INSURANCE COMPANY,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:
Edmond Collett, Esq.
On behalf of the Claimant

Stacy Huff, Esq.
On behalf of the Employer/Carrier

Joseph Luckett, Esq.
For the Director

BEFORE: THOMAS F. PHALEN, Jr.
Administrative Law Judge

DECISION AND ORDER – DENIAL OF BENEFITS

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, ("the Act") and the regulations thereunder, located in Title 20 of

the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.[1]

Garrett Taylor ("Claimant") filed his application for benefits under the Act on April 10, 2001. (DX 2).[2] On March 6, 2003, the District Director, Office of Workers' Compensation Programs ("OWCP") issued a proposed decision and order denial of benefits. (DX 33). The OWCP found that the evidence did not establish that Claimant was totally disabled due to pneumoconiosis arising out of coal mine employment. Counsel for Claimant requested a formal hearing on March 8, 2002. (DX 34).

On June 7, 2002, this case was referred to the Office of Administrative Law Judges by the OWCP for a hearing. (DX 35). A formal hearing on this matter was conducted on January 22, 2003, in Benham, Kentucky by the undersigned Administrative Law Judge. All parties were afforded the opportunity to call and to examine and cross examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

ISSUES

The issues in this case are:

I. Whether the claim was timely filed

II. Whether the Miner worked at least 23 years in or around one or more coal mines;

III. Whether the Miner has pneumoconiosis as defined by the Act;

IV. Whether the Miner's pneumoconiosis arose out of coal mine employment;

V. Whether the Miner is totally disabled; and

VI. Whether the Miner's disability is due to pneumoconiosis.

(DX 35). The issues of whether the claim was timely filed, whether the person upon whose disability the claim is based is a miner, and whether the named employer is the responsible operator were withdrawn by counsel for Employer at the hearing.

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1 The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

2 In this Decision, "DX" refers to the Director's Exhibits, "EX" refers to the Employer's Exhibits, "CX" refers to the Claimant's Exhibits, and "TR" refers to the official transcript of this proceeding.

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

Claimant was born on September 6, 1953; he was 55 years old at the time of the hearing. (DX 1). Claimant has an eighth grade education. (DX. 1). He testified at the hearing he worked twenty-five years in underground coal mine employment. (TR. 14 –19) Mr. Taylor stated he was a former smoker for the past twenty years having quit one year ago. (TR 13)

Timeliness

The issue of timeliness was withdrawn by counsel for Employer at the Hearing. (Tr. 10). Accordingly, I find that this claim is timely filed.

Responsible Operator

Liability under the Act is assessed against the most recent operator which meets the requirements of §§ 725.494 and 725.495. The District Director identified RB Coal Company as the putative responsible operator. (DX 17). Employer sent a letter to OWCP accepting this designation on September 13, 2001. (DX. 21). Based on the Employer's correspondence and the evidence contained in the record, I find that RB Coal Company is the employer with whom Mr. Taylor spent his last cumulative one year period of coal mine employment, and it is properly designated as the responsible operator in this case. *See* §725.493(a)(1).

Length of Coal Mine Employment

At the hearing, counsel for Employer withdrew as a contested issue the issue of length of coal mine employment. In accordance with Employer's withdrawal of the issue and the evidence of Claimant's employment history, I find that Claimant was a coal miner within the meaning of § 402(d) of the Act and § 725.202 of the regulations for a period of twenty-three years.

MEDICAL EVIDENCE

Section 718.101(b) requires any clinical test or examination to be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered. *See* §§ 718.102 - 718.107. The claimant and responsible operator are entitled to submit, in support of their affirmative cases, no more than two chest x-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two blood gas studies, no more than one report of each biopsy, and no more than two medical reports. § 725.414(a)(2)(i) and (3)(i). Any chest x-ray interpretations, pulmonary function studies, blood gas studies, biopsy report, and physician's opinions that appear in a medical report must each be admissible under § 725.414(a)(2)(i) and (3)(i) or paragraph § 725.414(a)(4). §§ 725.414(a)(2)(i)

and (3)(i). Each party shall also be entitled to submit, in rebuttal of the case presented by the opposing party, no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, or biopsy submitted, as appropriate, under paragraphs (a)(2)(i), (a)(3)(i), or (a)(3)(iii). §§ 725.414(a)(2)(ii), (a)(3)(ii), and (a)(3)(iii). Notwithstanding the limitations of §§ 725.414(a)(2) or (a)(3), any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence. § 725.414(a)(4).

Counsel for Claimant submitted a pre-hearing report, designating as Claimant's Exhibit 2, records from Glen Baker, M.D. covering September 28, 2001 until December 21, 2002, describing Dr. Baker's "black lung treatment." Dr. Baker's treatment records are admissible under § 725.414(a)(3)(1).

X-RAY REPORTS

Exhibit	**Date of X-ray**	**Date of Reading**	**Physician/Qualifications**	**Interpretation**
DX 11	8/08/01	8/08/01	Hussain	Negative
DX 11	8/08/01	8/25/01	Sargent, BCR[3], B-reader[4]	film quality 2
DX 12	4/28/01	4/28/01	Baker, B-reader	1/0
DX 12	8/10/01	8/15/01	Wiot, BCR, B-reader	Negative
DX 13	8/10/01	8/10/01	Dahhan, B-reader	Negative
DX 15	4/28/01	9/04/01	Halbert, BCR, B-reader	Negative
CX 1	12/21/02	12/21/02	Baker, B-reader	1/0
EX 1	12/20/02	1/22/03	West, BCR, B-reader	Negative

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[3] A physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. *See* 20 C.F.R. § 727.206(b)(2)(III). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

[4] A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.5l) Consequently, greater weight is given to a diagnosis by a "B" Reader. *See Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).

PULMONARY FUNCTION STUDIES

Exhibit/ Date	**Co-op./ Undst./ Tracings**	**Age/ Height**	**FEV_1**	**FVC**	**MVV**	**FEV_1/ FVC**	**Qualifying Results**
DX 11* 8/8/01	Good/ Good/ Yes	47 69"	1.88	4.34	44	43%	Yes
DX 12* 4/28/01	N/A/ N/A/ Yes	47 68”	2.00	3.69	49	54%	Yes
DX 13* 8/10/01	Good/ Good/ Yes	47 172cm	2.47	3.46	36	71%	No
DX 13** 8/10/01	Good/ Good/ Yes	47/ 172cm	2.49	3.53	42	71%	No
DX 14* 7/19/01	N/A/ N/A/ Yes	47 68”	2.51	4.12	N/A	61%	No
DX 14* 9/13/01	N/A/ N/A/ Yes	48 68”	2.43	4.04	N/A	60%	No
DX 14* 5/24/01	N/A/ N/A/ Yes	47 68”	1.71	3.23	N/A	53%	Yes
CX1* 12/21/02	N/A/ N/A/ Yes	49 58”	3.56	4.36	N/A	58%	No

*pre-bronchodilator values
** post bronchodilator values

ARTERIAL BLOOD GASES

Exhibit	Date	pCO_2	pO_2	Qualifying
DX 11*	8/08/01	38.5	82.0	No
DX 11**	8/08/01	36.3	74.0	No
DX13*	8/10/01	39.3	74.2	No
DX 13**[4]	8/10/01	36.6	94.5	No
DX 12	4/28/01	39.0	76.0	No
CX 1	12/21/02	39.0	76.0	No

*Results obtained without exercise
**Results obtained with exercise

Narrative Medical Evidence

Glen Baker, M.D. examined Claimant on April 28, 2001 and completed a Medical History and Examination for Coal Workers' Pneumoconiosis form. (DX 12). He noted Claimant's statement that he worked in the coal mining industry for 25 years. Dr. Baker also documented a smoking history of one pack per day for the last twenty-one years. Claimant reported a history of cough with sputum production, wheezing, and dyspnea on a daily basis for the last six or seven years. On physical examination, Dr. Baker noted hearing bilateral inspiratory and expiratory wheezes. Dr. Baker interpreted a chest x-ray as positive for the existence of pneumoconiosis. Dr. Baker submitted Claimant to a pulmonary function test ("PFT") and an arterial blood gas study ("ABG"). He found the results of the PFT to demonstrate a moderate obstructive ventilatory defect. From the ABG, he documented mild resting arterial hypoxemia. Dr. Baker diagnosed coal workers' pneumoconiosis category 1/0 based on chest x-ray and significant history of dust exposure. He also diagnosed hypoxemia from the ABG, as well as COPD based upon the PFT and chronic bronchitis based upon history. Dr. Baker attributed his diagnosed of coal workers' pneumoconiosis to Claimant's history of coal dust exposure. He determined Claimant's impairment caused by coal workers' pneumoconiosis, COPD, chronic bronchitis and hypoxemia to be a Class III Impairment according to Chapter 5, Guides to the Evaluation of Permanent Impairment, 5th Edition. Claimant's overall impairment was caused, at least in part, by coal dust exposure and in part by cigarette smoking. Based upon the Guide, Dr. Baker determined Claimant was 100% occupationally disabled from work in the coal mine industry as Claimant should have no further exposure to the offending occupational agent. Dr. Baker also found that Claimant pneumoconiosis was an occupational acquired lung disease caused by his coal mine employment. Dr. Baker also opined that Claimant did not retain the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment.

Imtiaz Hussain, M.D. examined Claimant on August 8, 2001 and completed a Medical History and Examination for Coal Workers' Pneumoconiosis form. (DX 11). He noted Claimant's statement that he worked in the coal mining industry for 23 years. Dr. Hussain also documented a smoking history of one pack per day from 1981 and continuing. Claimant reported a history of cough with sputum production, wheezing, and dyspnea on a daily basis. Dr. Hussain interpreted a chest x-ray as negative for the existence of pneumoconiosis. Dr. Hussain submitted Claimant to a PFT, an ABG, and an EKG. He found the results of the PFT to show moderate airway obstruction. From the ABG, he documented mild hypoxemia. He determined that the EKG was normal. Dr. Hussain diagnosed COPD based on Claimant's lengthy tobacco smoking history. He determined Claimant's impairment caused by cigarette smoking induced COPD to be minimal or none. Dr. Hussain then found that Claimant did not have an occupational lung disease caused by his coal mine employment. He found that Claimant had only a mild pulmonary impairment and Claimant retained the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment.

Abdul Dahhan, M.D. examined Claimant on August 10, 2001 and completed a narrative medical report. (DX 13). He noted Claimant's statement that he worked in the coal mining industry for 25 years. Dr. Dahhan also documented a smoking history of one half pack per day for the last twenty-one years Claimant reported a history of cough with sputum production and wheezing, but no hemoptysis on a daily basis. Dr. Dahhan noted on physical examination and increased AP diameter of the chest with hyper resonance to percussion. He interpreted a chest x-ray as negative for the existence of pneumoconiosis. Dr. Dahhan submitted Claimant to a PFT, an ABG, and an EKG. He found the results of the PFT to show a mild partially reversible obstructive ventilatory defect. From the ABG, he documented mild hypoxemia. He determined that the EKG was normal. Dr Dahhan also reviewed the medical records from the April 28, 2001 examination by Dr. Baker. Dr. Dahhan diagnosed chronic bronchitis based on Claimant's lengthy tobacco smoking history. He determined that Claimant's obstructive ventilatory defect was due to his lengthy and continuing smoking history. He determined Claimant's impairment caused by cigarette smoking induced chronic bronchitis to totally disabling. Dr. Dahhan also found that Claimant did not have an occupational lung disease caused by his coal mine employment and that Claimant's impairment was not due in any way to occupational dust exposure. Claimant did not retain the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Dr. Dahhan also diagnosed low back pain.

Claimant was again examined by Dr. Baker on December 21, 2002. (CX 1) Claimant underwent a chest x-ray and PFT. Dr. Baker diagnosed coal workers' pneumoconiosis based upon the chest x-ray. He found to PFT to show a mild obstructive ventilatory defect.

Treatment Records

Dr. Baker completed a new patient form and examined Claimant on May 24, 2001. (DX. 14). His examination notes are not readable. Dr. Baker notes a past history of arthritis. He also indicates Claimant had a prior ear surgery and broken back.

Dr. Baker completed a progress report form and examined Claimant on May 24, 2001. (DX 14). His examination notes are not readable. I am able to discern the letters "COPD" under the heading "Assessment".

Dr. Baker completed a progress report form and examined Claimant on July 19, 2001. (DX 14). His examination notes are not readable. "COPD /CWP" and "continue RX" are checked on this form.

Dr. Baker completed a progress report form and examined Claimant on September 13, 2001. (DX 14). His examination notes are not readable. "COPD and CWP" are circled on this form.

Smoking History

In the interrogatories included in the record, Claimant stated that he has smoked a half pack of cigarettes per day for the past twenty-one years. (DX 5). Claimant testified at the hearing that he quit smoking cigarettes approximately one year prior to the hearing. (Tr. 14). He stated he smoked less than one pack per day for twenty years before quitting. (Tr. 14) He also testified he continues to smoke a pipe off and on. (Tr. 13) Every physician of record who examined Claimant noted that, at the time of the examination, he was a current smoker having smoked for the past twenty years. I find Claimant smoked one pack of cigarettes or less per day from 1981 to 2002, and that he continues to infrequently smoke a pipe.

DISCUSSION AND APPLICABLE LAW

Mr. Taylor's claim was made after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, Claimant must establish, by a preponderance of the evidence, the following elements:

1. That he suffers from pneumoconiosis;

2. That the pneumoconiosis arose, at least in part, out of coal mine employment;

3. That the claimant is totally disabled; and

4. That the total disability is caused by pneumoconiosis.

See §§ 719.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore*, 9 B.L.R. 1-4, 1-5 (1986); *Roberts v. Bethlehem Mines Corp*., 8 B.L.R. 1-211, 1-212 (1985). Failure to establish any of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26, 1-27 (1987).

Pneumoconiosis

In establishing entitlement to benefits, Claimant must initially prove the existence of pneumoconiosis under § 718.202. Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). Pneumoconiosis is defined by the regulations:

For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.

> (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

Section 718.201(a).

Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis.

(1) Under § 718.202(a)(1), a finding that pneumoconiosis exists may be based upon x-ray evidence. The x-ray evidence of record demonstrates that pneumoconiosis is not present. Every B-reader and board-certified radiologist of record, namely Drs. West, Halbert, and Wiot found the films they reviewed negative for pneumoconiosis. These findings are supported by B-reader Dr. Dahhan, and Dr. Hussain. Under Part 718, where the x-ray evidence is in conflict, consideration shall be given to the readers' radiological qualifications. *Dixon v. North Camp Coal Co*., 8 BLR 1-344 (1985). Thus, it is within the discretion of the administrative law judge to assign weight to x-ray interpretations based on the readers' qualifications. *Goss v. Eastern Associated Coal Co*., 7 BLR 1-400 (1984). Accordingly, greater weight may be assigned to an x-ray interpretation of a B-reader, and the reading of a B-reader who is also a board-certified radiologist can be accorded even more weight. *Aimone v. Morrison Knudson Co*., 8 BLR 1-32

(1985). In this case, the only physician of record to find pneumoconiosis was Dr. Baker. I find his interpretations outweighed by the dually qualified physicians of record.

Furthermore, the record also contains more overall negative interpretations than positive. It is also within the discretion of the administrative law judge to defer to the numerical superiority of the x-ray interpretations. *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). The United States Court of Appeals for the Sixth Circuit, under whose appellate jurisdiction this case arises, has confirmed that consideration of the numerical superiority of the x-ray interpretations, when examined in conjunction with the readers' qualifications, is a proper method of weighing x-ray evidence. *Stanton v. Norfolk & Western Railway Co*., 65 F.3d 55 (6th Cir. 1995) (citing *Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993). Consequently, I find that the preponderance of the x-ray evidence, as reviewed by several B-readers and board-certified radiologists, fails to establish the existence of pneumoconiosis under Section 718.202(a)(1).

(2) Under § 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner, upon biopsy evidence. The record does not contain any biopsy evidence. Therefore, I find that the Claimant has failed to establish the existence of pneumoconiosis through biopsy evidence under subsection (a)(2).

(3) Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. In this case, the presumption of § 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis. Section 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of § 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982. Therefore, Claimant cannot establish pneumoconiosis under subsection (a)(3).

(4) The fourth and final way in which it is possible to establish the existence of pneumoconiosis under § 718.202 is set forth in subsection (a)(4) which provides in pertinent part:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

§ 718.202(a)(4).

This section requires a weighing of all relevant medical evidence to ascertain whether or not the claimant has established the presence of pneumoconiosis by a preponderance of the evidence. Any finding of pneumoconiosis under § 718.202(a)(4) must be based upon objective medical evidence and also be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician’s conclusions. Fields v. Island Creek Coal Co., 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists

where the physician sets forth the clinical findings, observations, facts, and other data on which he bases his diagnosis. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985).

Dr. Baker is the only physician of record to diagnosis pneumoconiosis. He based his diagnosis of CWP on a positive chest x-ray and Claimant's significant history of exposure to coal dust. The Sixth Circuit Court of Appeals has held that merely restating an x-ray is not a reasoned medical judgment under § 718.202(a)(4). *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). The Board has also explained that, when a doctor relies solely on a chest x-ray and coal dust exposure history, a doctor's failure to explain how the duration of a miner's coal mine employment supports his diagnosis of the presence or absence of pneumoconiosis renders his opinion "merely a reading of an x-ray . . . and not a reasoned medical opinion." *Taylor v. Brown Bodgett, Inc.*, 8 B.L.R. 1-405 (1985). *See also Worhach v. Director, OWCP*, 17 B.L.R. 1-105, 1-110 (1993)(citing*Anderson v. Valley Camp of Utah, Inc.* , 12 B.L.R. 1-111, 1-113 (1989)(it is permissible to discredit the opinion of a physician which amounts to no more than a restatement of the x-ray reading). Dr. Baker's opinion does not constitute a reasoned medical judgment under this subsection. Therefore, I find that Dr. Baker's opinion is entitled to little probative weight.

Dr. Baker's office notes cannot support a finding of pneumoconiosis either. Dr. Baker did circle the initials for coal workers' pneumoconiosis and chronic bronchitis in both the January 19, 2001 and September 13, 2001 progress notes, but there is not any documentation or related rationale to support what must be inferred as a diagnosis of pneumoconiosis.

In contrast to the opinion of Dr. Baker, Drs. Hussain and Dahhan find that Claimant did not suffer from CW P. Their opinions are reasoned and documented. Their reports are based upon the objective medical data of record, and take into consideration Claimant's past social, occupational, and medical histories. Dr. Dahhan's opinion is entitled to enhanced probative weight based on his credentials as a board-certified pulmonologist.

The record does not contain a narrative diagnosis of pneumoconiosis that is supported by a reasoned medical opinion. Therefore, I find that Claimant has not established the existence of pneumoconiosis under subsection (a)(4). Claimant has not established the existence of pneumoconiosis under any applicable subsection of § 718.202(a). Accordingly, I find that Claimant has not established the existence of pneumoconiosis.

Total Disability

Even though Claimant did not establish the existence of pneumoconiosis, I will still analyze the evidence presented on the issue of total disability. To prevail, Claimant must also demonstrate that he is totally disabled from performing his usual coal mine work or comparable work due to pneumoconiosis under one of the five standards of § 718.204(b) or the irrebuttable presumption referred to in § 718.204(b). The Board has held that under Section 718.204(b), all relevant probative evidence, both "like" and "unlike" must be weighed together, regardless of the category or type, in the determination of whether the Claimant is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986); *Rafferty v. Jones & Laughlin Steel Corp*., 9

B.L.R. 1-231 (1987). Claimant must establish this element of entitlement by a preponderance of the evidence. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

The record does not contain any evidence that Claimant suffers from complicated pneumoconiosis. I find that Claimant has not established that Miner suffered from complicated pneumoconiosis. Therefore, the irrebuttable presumption of § 718.304 does not apply.

Total disability can be shown under § 718.204(b)(2)(i) if the results of pulmonary function studies are equal to or below the values listed in the regulatory tables found at Appendix B to Part 718. The tests conducted on April 28, 2001, May 24, 2001, and August 8, 2001 produced values indicative of total disability under the Act. Dr. Burki found acceptable the results of the August 8, 2001 PFT in a September 2, 2001 report. (DX 11). The three remaining PFTs of record, which were conducted on July 19, 2001, September 10, 2001, and December 21, 2002, did not produce qualifying values. I attribute greater probative weight to the December 21, 2002 PFT, since it is most indicative of Claimant's pulmonary condition at the time of the hearing. While the three qualifying tests indicate the presence of a pulmonary impairment, they are insufficient to establish the existence of a totally disabling pulmonary impairment in light of three non-qualifying tests, two of which were conducted after the three qualifying tests. Therefore, I find that Claimant has not demonstrated total disability under subsection (b)(2)(i).

Total disability can be demonstrated under § 718.204(b)(2)(ii) by the results of arterial blood gas studies. None of the ABGs of record produced qualifying values. Therefore, I find that Claimant has not demonstrated total disability under subsection (b)(2)(ii).

Total disability may also be shown under § 718.204(b)(2)(iii) if the medical evidence indicates that Claimant suffers from cor pulmonale with right-sided congestive heart failure. There is no evidence regarding cor pulmonale to consider. Therefore, I find that Claimant has not demonstrated total disability under subsection (b)(2)(iii).

Section 718.204(b)(2)(iv) provides for a finding of total disability if a physician, exercising reasoned medical judgment based on medically acceptable clinical or laboratory diagnostic techniques, concludes that Miner's respiratory or pulmonary condition prevented Miner from engaging in his usual coal mine employment or comparable gainful employment. Miner held various underground and above ground mining positions for Employer, including end loader, coal shoveler, and general laborer.

The exertional requirements of the claimant's usual coal mine employment must be compared with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc*., 227 F.3d 569 (6th Cir. 2000). Once it is demonstrated that the miner is unable to perform his usual coal mine work, a prima facie finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204(b)(1). *Taylor v. Evans & Gambrel Co*., 12 B.L.R. 1-83 (1988). Nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis. § 718.204(a); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (1994). All evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing

the burden of establishing by a preponderance of the evidence the existence of this element. *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201 (1986).

Dr. Baker, relying on the results of his April 28, 2001 clinical exam, PFT, and ABG, found Claimant to be suffering from a moderate obstructive ventilatory defect and mild resting arterial hypoxemia. He assessed Claimant's impairment as Class III impairment, and opined that Claimant did not retain the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment. Dr. Baker considered an accurate account of Claimant's smoking and coal mine employment histories. He set forth clinical observations and findings, and his reasoning is supported by adequate data. His opinion is reasoned and documented. I find that Dr. Baker's opinion is entitled to probative weight enhanced by his credentials as a board-certified pulmonologist. However, Dr. Baker examined Claimant again on December 21, 2002, and he conducted another PFT and ABG. This time, Dr. Baker opined that Claimant suffered from a mild obstructive ventilatory defect.

Dr. Hussain conducted a physical exam, PFT, and ABG on August 8, 2001. He opined that Claimant suffered from a moderate airway obstruction and mild hypoxemia. Dr. Hussain then concluded that Claimant only had a mild pulmonary impairment, and he found that Claimant retained the respiratory capacity to perform his previous coal mine employment or comparable work in a dust-free environment. Dr. Hussain set forth clinical observations and findings, and his reasoning is supported by adequate data. He considered an accurate account of Claimant's smoking and coal mine employment histories. His opinion is reasoned and documented. I find that Dr. Hussain's opinion is entitled to probative weight.

From the August 10, 2001 clinical exam, PFT, and ABG he conducted, Dr. Dahhan found that claimant suffered from a mild, partially reversible, obstructive ventilatory defect and mild hypoxemia. Dr. Dahhan opined that Claimant's pulmonary impairment was totally disabling. He found that Claimant did not retain the respiratory capacity to return to his previous coal mine employment or comparable work in a dust-free environment. He considered an accurate account of Claimant's smoking and coal mine employment histories. Dr. Dahhan set forth clinical observations and findings, and his reasoning is supported by adequate data. His opinion is reasoned and documented. I find that Dr. Dahhan's opinion is entitled to probative weight enhanced by his credentials as a board-certified pulmonologist.

The preponderance of the evidence establishes that Claimant suffers from a mild obstructive defect and mild hypoxemia. At some point during 2001, Claimant's obstructive defect may have been moderate, but the evidence establishes that is improved some-what, resolving to a mild impairment. Claimant was 55 years-old at the time of the hearing. His usual coal mine employment involved operating machinery and performing manual labor below and above ground. Drs. Baker and Dahhan both found that Claimant was totally disabled. The opinions of Drs. Baker and Dahhan are entitled to greater weight than Dr. Hussain's opinion based on their credentials. I find that Claimant has established the existence of a totally disabling respiratory impairment under subsection (b)(2)(iv).

As a whole, Claimant established the existence of a totally disabling respiratory impairment by narrative opinion evidence, but failed to establish total disability through the

PFTs or ABGs, and there was no evidence that Claimant suffered from complicated pneumoconiosis or cor pulmonale with right-sided congestive heart failure. Even though the preponderance of the PFT and ABG evidence did not establish total disability, Drs. Baker and Dahhan relied on the results of the PFTs and ABGs to diagnose a mild obstructive defect and mild hypoxemia. After taking into account Claimant's coal mine employment and smoking history, both Dr. Baker and Dr. Dahhan found that Claimant could not return to his previous coal mine employment or comparable work in a dust-free environment. I find that narrative evidence to be the most probative regarding the degree of Claimant's pulmonary impairment since it took into account clinical findings, as well as the PFT and ABG evidence. Three of the PFTs did in fact qualify for a finding of total disability. I find that a preponderance of the evidence establishes that Claimant suffers from a totally disabling respiratory or pulmonary impairment.

Total Disability Due to Pneumoconiosis

Assuming, arguendo, that Claimant had established the existence of pneumoconiosis arising out of coal mine employment, I will now analyze whether Claimant's totally disabling respiratory or pulmonary impairment was due to pneumoconiosis. The amended regulations at § 718.204(c) contain the standard for determining whether a miner's total disability was caused by pneumoconiosis. Section 718.204(c)(1) determines that a miner is totally disabled due to pneumoconiosis if pneumoconiosis, as defined in § 718.201, is a "substantially contributing cause" of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a material adverse effect on the miner's respiratory or pulmonary condition or if it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. §§ 718.204(c)(1)(i) and (ii). Section 718.204(c)(2) states that, except as provided in § 718.305 and § 718.204(b)(2)(iii), proof that the Miner suffered from a totally disabling respiratory or pulmonary impairment as defined by §§ 718.204(b)(2)(i), (ii), (iv), and (d) shall not, by itself, be sufficient to establish that the miner's impairment was due to pneumoconiosis.

Except as provided by § 718.204(d), the cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical report. § 718.204(c)(2). The Sixth Circuit Court of Appeals has stated that pneumoconiosis must be more than a "de minimus or infinitesimal contribution" to the miner's total disability. *Peabody Coal Co. v. Smith*, 12 F. 3d 504, 506-507 (6th Cir. 1997). The Sixth Circuit has also held that a claimant must affirmatively establish only that his totally disabling respiratory impairment (as found under § 718.204) was due 'at least in part' to his pneumoconiosis. *Cf*. 20 C.F.R. 718.203(a)." *Adams v. Director, OWCP*, 886 F.2d 818, 825 (6th Cir. 1988); *Cross Mountain Coal Co. v. Ward*, 93 F.3d 211, 218 (6th Cir. 1996)(opinion that miner's "impairment is due to his combined dust exposure, coal workers' pneumoconiosis as well as his cigarette smoking history" is sufficient). More recently, in interpreting the amended provision at § 718.204(c), the Sixth Circuit determined that entitlement is not precluded by "the mere fact that a non-coal dust related respiratory disease would have left the miner totally disabled even without exposure to coal dust." *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk}*, 264 F.3d 602 (6th Cir. 2001). A miner "may nonetheless possess a compensable injury if his pneumoconiosis materially worsens this condition." *Id*.

The reasoned medical opinions of those physicians who diagnosed the existence of pneumoconiosis and that Miner was totally disabled are more reliable for assessing the etiology of Miner's total disability. *See, e.g. Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819 (4th Cir. 1995); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995).

Dr. Baker diagnosed the existence of pneumoconiosis, found Claimant to be totally disabled, and attributed Claimant's total disability to Claimant's history of coal dust exposure and cigarette smoking. Dr. Baker considered an accurate account of Claimant's coal mine employment and smoking histories. He set forth clinical observations and findings. Dr. Baker's opinion is reasoned and documented. I find that his opinion is entitled to probative weight enhanced by his credentials as a board-certified pulmonologist.

Dr. Hussain opined that Claimant did not have an occupational lung disease due to his coal mine employment. He also found that Claimant was not totally disabled due to a mild pulmonary impairment. Dr. Hussain attributed Claimant's mild pulmonary impairment to Claimant's lengthy tobacco habit. He set forth clinical observations and findings, and his reasoning is supported by adequate data. However, his opinion that Claimant was not totally disabled is contrary to the preponderance of the evidence. Therefore, I find that Dr. Hussain's opinion is entitled to a lesser degree of probative weight.

Dr. Dahhan found that Claimant did not suffer from CWP, and he also determined that Claimant suffered from a totally disabling respiratory impairment. Dr. Dahhan opined that Claimant's pulmonary impairment was due to Claimant's lengthy and continuing smoking history. Dr. Dahhan set forth clinical observations and findings, and his reasoning is supported by adequate data. He considered an accurate account of Claimant's smoking and coal mine employment histories. His opinion is reasoned and documented. I find that Dr. Dahhan's opinion is entitled to probative weight enhanced by his credentials as a board-certified pulmonologist.

Drs. Dahhan and Hussain attribute Claimant's pulmonary impairment to Claimant's lengthy history of cigarette smoking, while Dr. Baker finds that Claimant's impairment was due, at least in part, to Claimant's exposure to coal dust. Dr. Baker does not provide any rationale to support his conclusions. Claimant had a lengthy smoking and coal dust exposure history. The preponderance of the evidence fails to establish that Claimant's total disability was due, at least in part, to his pneumoconiosis.

Entitlement

Claimant, Garrett Taylor, has failed to prove, by a preponderance of the evidence, that he suffers from pneumoconiosis or that he suffers from a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. Therefore, I find that Mr. Taylor is not entitled to benefits under the Act.

Attorney's Fees

An award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for the representation and services rendered in pursuit of the claim.

ORDER

IT IS ORDERED that the claim of Garrett Taylor for benefits under the Act is hereby DENIED.

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THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing notice of appeal with the Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601. **A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.**